United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

LEON SEGAN, :

Plaintiff-Appellant, :

-against- :

DREYFUS CORPORATION, et al., :

Defendants-Appellees. :

- x

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES DREYFUS CORPORATION, STEIN, JOHNSON, SMERLING AND GREENE

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COUNTER-STATEMENT OF QUESTION PRESENTED

In the opinion of appellees, the only question presented by this appeal is whether, in a case involving multiple charges of fraud, the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure, is satisfied by a complaint which fails, with but one exception, to describe or even identify any of the transactions alleged to be fraudulent.

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BRIEF OF DEFENDANTS-APPELLEES
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Preliminary Statement

This is an appeal from an Order of the District Court (Cannella, J.) in a derivative shareholders suit dismissing, without prejudice, a complaint in a case charging securities fraud.

The District Court had previously found the complaint to be in violation of the "particularity" requirement of Rule 9(b) and directed appellant to file a more definite statement. (A-63 to 65). Appellant, however, refused to comply with the Court's Order, even though he

claimed to have the ability to do so (A-90 to 91), and now appeals from that Order as well.

Counter-Statement of the Case

Plaintiff-appellant is a shareholder of the Dreyfus Fund (Fund).

Defendants-appellees are the Dreyfus Corporation (Dreyfus); four of its officers; Marine Midland Banks, Inc. (Marine-Midland); Dreyfus Marine Midland Management Corp. (Dreyfus-Marine), a joint venture of Dreyfus and Marine-Midland; International Telephone & Telegraph Corporation (ITT); Lazard Freres (Lazard) and two of its partners.

The complaint in this case is replete with details as to non-essentials. It identifies at length the defendants, their relationships and their business activities. It has only one significant omission. It fails, with but one exception, to describe or even identify any of the transactions alleged to be fraudulent.

This action had its genesis in several items which appeared in The New York Times on various dates between March 26, 1972 and April 9, 1972 (A-153, A-161). Just five days after the last of these stories had appeared, plaintiff filed his complaint.

In substance, The New York Times reported that ITT, then the subject of extended publicity, had obtained a favorable tax ruling by selling certain stock of Hartford Fire Insurance Co. to an Italian Bank under circumstance which guaranteed the bank against loss on a subsequent sale. The New York Times further reported that after the bank had exchanged its shares of Hartford stock for stock in ITT, Dreyfus was induced by ITT to purchase certain of those shares on behalf of the Fund, thereby relieving ITT of its liability under its agreement with the bank.* The Times further reported that ITT had thereafter rewarded Dreyfus by retaining Dreyfus-Marine to manage a portion of the ITT Pension Fund portfolio.

The complaint, however, was not limited to charges of wrongdoing in respect of the ITT transaction. Instead, plaintiff's counsel, apparently reasoning from the particular to the general, drew a complaint charging the defendants other than the Fund with engaging in a series of fraudulent transactions during a three-year period, the purpose of which was to favor Dreyfus-Marine at the expense of the

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* We note in passing that the complaint makes no claim that the price paid by the Fund was excessive.

Fund (¶ 27, A-17 to 18).* None of these transactions, however, were in any way described and appellant has adamantly refused even to identify them.

The critical paragraphs of the complaint for the purpose of this appeal are Paragraphs 20 through 28.

Paragraph 20 consists of admittedly conclusory recitations of fraud accusing defendants of having "(a) engaged in acts and practices involving personal misconduct ... (b) employed a device, scheme or artifice to defraud Dreyfus Fund ... (c) engaged in transactions, practices and a course of conduct which operated to defraud Dreyfus Fund. ..." (A-11 to 12; Segan Br. at 43).

Paragraphs 22 through 28 are also conclusory. Thus, for example, they contain sweeping allegations that Dreyfus and its officers failed "to properly perform their fiduciary obligation" (Para. 22, A-15); that they deprived the Fund of "guidance, uninfluenced by motives of personal gain" (Para. 24, A-15 to 16); and that they diverted and channelled profits, earnings and assets from the Fund to defendant Dreyfus-Marine (Para. 25, A-16). Each and every

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* The complaint was amended in certain respects not here material on October 19, 1972. The complaint reprinted in the appendix is the complaint as amended, and all references in the briefs are similarly to the amended complaint.

one of these allegations was made solely upon information and belief, as were all other allegations of wrongdoing, but the complaint contained no recital of the facts upon which appellant's "information and belief" was based.

The only paragraph of the complaint which contains any element of specificity whatsoever is Paragraph 21. That paragraph alleges that "part of" the wrongs complained of involved the utilization by Dreyfus of its position as investment manager of the Fund to obtain for Dreyfus-Marine the management of a pension fund controlled by ITT.

The proceedings in the District Court established, however, that plaintiff's complaint was not limited to the ITT transaction. It was established beyond argument, and appellant here concedes, that the ITT transaction is merely illustrative of a series of transactions, involving securities of other companies, which appellant claims were designed to favor Dreyfus-Marine at the expense of the Dreyfus Fund (¶ 11-12, A-35 to 38; Segan Br. 25). Attempts to obtain any information with respect to these other transactions, however, were totally unsuccessful.

Even before the original motion to dismiss was made in November 1972, defendants Lazard Freres and its partners attempted to obtain the factual underpinnings of the complaint by deposition (A-149 to 203). The deposition, however, was as uninformative as it was frustrating, a fact which is not surprising when it is recalled that this complaint was prompted by newspaper items (A-153). Plaintiff claimed at his deposition that he was relying on the investigation of counsel (A-152, 162, 181, 188) and then proceeded at the direction of counsel to invoke the attorney-client and work-product privileges (A-156, 162, 165, 166, 177, 187, 188, 194, 199).

Shortly after the decision of this Court in Segal v. Gordon, 462 F.2d 602 (1972) was rendered appellant's counsel was advised informally that a motion would be made to dismiss the complaint for failure to comply with Rule 9(b) unless he amended the complaint voluntarily to set forth the unidentified transactions complained of. Appellant's counsel did, in fact, thereafter amend the complaint in other respects, but declined to identify the transactions claimed to be fraudulent. Instead, he proceeded to propound interrogatories to the defendants some 54 pages in length,

containing hundreds of separate questions, in 94 separately numbered paragraphs. These interrogatories were designed to probe in depth into every transaction that the Dreyfus Fund entered into or even contemplated during a four-year period (A-94 to 148), transactions numbering literally in the thousands. On their face, these interrogatories constitute a gross abuse of the discovery process, and epitomize the "pseudo-legal harassment" against which Judge Moore cautioned in Segal, supra, at 609.

Plaintiff's counsel asserted, by way of justification, that through answering these interrogatories, defendants would somehow divine the transactions with respect to which appellant was asserting impropriety (Foley Aff. Para. 24, A-42). Appellant's counsel sought to justify his unwillingness to specify the transactions which he claimed to be fraudulent by asserting that he was seeking to protect the identity of an unidentified "informer" who was claimed to have supplied information upon which the conclusory allegations of the complaint were based; a position he continues to assert to this day.

In November 1972, defendants moved to dismiss for failure to comply with Rule 9(b) of the Federal Rules

of Civil Procedure. The District Court, in holding that the complaint did not comply with the requirements of Rule 9(b), and directing plaintiff to file a more definite statement, said (A-64 to 65):

> "The affidavit of plaintiff's attorney evidences plaintiff's theory that he may set forth one instance of alleged fraud as a 'typical example' (p. 7 ¶ 11 Foley affidavit), and as 'an illustration of the flagrant misconduct' (p. 9, ¶ 12), and not only thereby comply with Rule 9(b), but use the example as a springboard for a sweeping inquiry into all acts of the defendants in an effort to discover other instances of misconduct.
>
> "The requirements of Rule 9(b) that 'the circumstances constituting fraud ... shall be stated with particularity', are not met by alleging examples or illustrations where multiple charges are made or intended. 'A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not find one'. Segal v. Gordon, 467 F.2d 602, 607-608 (2d Cir. 1972)."

Instead of complying with the District Court's directive, however, appellant on September 12, 1973, filed a motion, allegedly pursuant to Rules 26 and 27 of the Federal Rules of Civil Procedure, in which he sought leave to engage in discovery, purportedly for the purpose of obtaining information which would permit him to plead the transactions claimed to be fraudulent. In essence,

the motion sought permission to repropound plaintiff's interrogatories and to obtain answers prior to the filing of the more definite statement which Judge Cannella had ordered some four months earlier.

Declining to permit the "unwarranted exploration of defendants' businesses and affairs now sought", the District Court observed (A-91):

> "The court finds no authority under Rule 26 which permits discovery in support of an infirm complaint such as had been found here. To permit such discovery would be violative of Rule 9(b) and the instruction given to this court in Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972). Rule 27 also relied upon by the plaintiff is without application. The Rule applies to the perpetuation of testimony of the petitioner or of another person regarding any matter that may be cognizable in a court of the United States, clearly not the purpose here.
>
> "The plaintiff persists in the attitude that he does have information which will enable him to comply with the order of the court and yet declines to do so unless permitted the unwarranted exploration of the defendants' businesses and affairs now sought."

ARGUMENT

Introduction

At the outset, we note that appellant's brief displays fundamental misconceptions not only of the purpose of the "particularity" requirement of Rule 9(b), but also of the requirements of Judge Cannella's Order directing the filing of a more definite statement.

The purpose of Rule 9(b) is not, as appellant suggests, to require pleading of "ultimate facts" as opposed to mere "conclusions", though we note in passing that with the possible exception of the ITT transaction, the complaint here does not even meet the "ultimate fact" test urged by appellant. Its purpose, rather, is rooted in fundamental concepts of fairness and justice. As noted by Circuit Judge Moore, in Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972):

> "Rule 9(b)'s specificity requirement stems not only from the desire to minimize the number of strike suits but also more particularly from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing:

> It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." (Emphasis added) (Footnote omitted).

Judge Moore further noted that "[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one" (Id. at 607-08).

Nor did Judge Cannella require (or defendants even demand) the pleading of "minute evidentiary details", as repeatedly contended by appellant. (E.g., Segan Br. at 33, 35 to 36, 38). As the moving papers below (A-24 to 28) made clear, defendants below, confronted with a complaint containing the most sweeping and general conclusory allegations of fraud, sought to discover only what fraudulent transactions they were accused of having perpetrated. Indeed, Judge Cannella's Order suggests that he might have held sufficient allegations no more detailed than the general allegations respecting the ITT transactions (A-78).

I. THE COMPLAINT FAILS TO ALLEGE THE CIRCUMSTANCES CONSTITUTING FRAUD WITH THE PARTICULARITY REQUIRED BY RULE 9(b)

A. The Court's Decision in Segal v. Gordon Is Controlling

Rule 9(b) of the Federal Rules of Civil Procedure provides as follows:

> "(b) Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Under Rule 9(b), a complaint containing conclusory allegations of "fraud" or "fraudulent acts" is fatally defective unless the pleader also sets forth with particularity the specific acts and transactions complained of, in sufficient detail to demonstrate that deception in one form or another has occurred. Mooney v. Vitolo, 435 F.2d 838 (2d Cir. 1970); Kellman v. ICS, Inc., 447 F.2d 1305, 1309-10 (6th Cir. 1971); Seward v. Hammond, 8 F.R.D. 457, 459 (D. Mass. 1948); cf. Chicago Title & Trust Co. v. Fox Theatres Corporation, 182 F.Supp. 18, 31 (S.D.N.Y. 1960); Lynn v. Valentine, 19 F.R.D. 250, 254 (S.D.N.Y. 1956); Dixie

Mercerizing Company v. Triangle Thread Mills Inc., 17 F.R.D. 8 (S.D.N.Y. 1955).

As stated somewhat differently by Judge Moore in Segal, supra at 607, the "circumstances constituting the alleged fraud should be described with particularity" (emphasis added).

Clearly, in its present form, the complaint here is fatally defective. It is indeed a classic example of the pleading deficiencies condemned by Rule 9(b). Appellant's brief and the various affidavits of his counsel submitted to the court below leave no doubt whatever that plaintiff seeks to allege a series of fraudulent transactions over a three to four year period (Foley Aff. ¶ 10, A-33, to 35, Foley Aff. ¶ 3 to 4, A-68 to 69). Indeed, in his brief to this Court appellant states:

> "This course of conduct did not merely involve one transaction with I.T.T. Rather, it involved a continuing pattern of such transactions which were similar to one another, in that, in each the buying power of the Fund was utilized to obtain consideration which did not enure to the benefit of the Fund but, rather, enriched its fiduciaries. (A-69, 70)" (Segan Br. at 25).

But these transactions are nowhere even identified in the complaint, much less pleaded with particularity. Presumably if the allegations of Paragraph 21(g) of the complaint are to be taken as illustrative, plaintiff will

claim that the Dreyfus Corporation caused the Dreyfus Fund to buy or sell securities of companies A, B or C in order to obtain the management of pension or other funds by Dreyfus-Marine--though the complaint is silent even on this basic point. Nowhere does the complaint specify the names of companies whose securities were bought or sold, or the names of the pension or other funds the management of which was thereby acquired by Dreyfus-Marine, or the casual relationship between the two.*

In short, the complaint in its present form, except for its denomination of ITT, fails even to identify, much less to specify the particulars of, any of the transactions which are said to constitute the frauduent course of conduct complained of.

The rationale of Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972), has been repeatedly applied by the lower

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* The situation in respect of ITT in the Mediobanca transaction is obviously unique. The basic lack of any plausible motive which could have led other corporations to participate in conduct similar to that imputed to ITT makes it seem highly unlikely that any such transactions, in fact, took place. Equally implausible is the claim that ITT participated in transactions in respect of securities other than its own for a period of three or four years. It seems obvious that these anomalous claims result from an attempt to generalize from the specific.

courts. E.g., Goldberg v. Shapiro, CCH Sec.L. Rep. ¶ 94,813 (S.D.N.Y. 1974) (not yet officially reported); Goodall v. Columbia Ventures, Inc., 374 F. Supp. 1324 (S.D.N.Y. 1974); Lewis v. Varnes, 368 F. Supp. 45, 47 (S.D.N.Y. 1974); Spiegler v. Wills, 60 F.R.D. 681, 683 (S.D.N.Y. 1973). We respectfully submit that Segal v. Gordon is controlling here.

We deal but briefly with appellant's attempts to distinguish the Segal decision:

(1) The claim that Segal is inapplicable here because the complaint in Segal was one and one-half pages in length while the complaint in the present action runs thirteen pages (A-7 to 20) is patently absurd. Clearly, the Segal decision intended to condemn precisely the type of conclusory allegations relied on by appellant here. A plaintiff is not entitled to proceed on the basis of conclusory allegations of fraud merely because he has shown ingenuity in proliferating such allegations.

(2) The Segal decision itself directly refutes appellant's contention that Rule 9(b)'s particularity requirement is satisfied if the defendants can answer the complaint. The complaint in Segal was dismissed for failure to satisfy Rule 9(b) despite the fact that a number of the defendants had previously answered the complaint (467 F.2d at 605).

(3) Appellant's argument that compliance with Rule 9(b) would lead to the demolition of Rule 8 "in all complaints respecting a wrongful course of conduct". (Segan Br. at 48) is also untenable. If, in fact, a plaintiff knows of a whole series of transactions claimed to be fraudulent, there is no reason why each can not be specifically alleged. Furthermore, the argument ignores the fact that Rule 8 must be read in the light of Rule 9(b) in a case alleging fraud. Producers Releasing Corp. of Cuba v. Pathe Industries Inc., 10 F.R.D. 29, 32 (S.D.N.Y.), rev'd on other grounds, 184 F.2d 1021 (2d Cir. 1950). Indeed, the court in Stuckey v. duPont Glore Forgan, Inc., 59 F.R.D. 129, 130 (N.D. Cal. 1973) held:

> ". . . Rule 9(b) constitutes a specific exception to the general rules of pleading set out in Rule 8. A generalized summary of the case does not meet the requirements of Rule 9(b)."

Obviously, if a complaint alleging fraud can stand if it meets the requirements of Rule 8, then Rule 9(b) would be redundant and meaningless. While, therefore, the pleading of evidence is not required, the allegations in a fraud complaint must be sufficiently specific to advise a defendant what transactions are claimed to be fraudulent, and of the circumstances

which constitute the alleged fraud.

(4) We come, finally, to appellant's reliance upon a complaint filed by the SEC in the United States District Court for the Southern District of New York on March 4, 1971, approximately a year before Segal v. Gordon was decided. (Segan Br. at 48-49; 57-76). Examination of this SEC complaint shows it to be a far more detailed and specific complaint than that which appellant seeks to sustain here. There is, to be sure, some general conclusory language scattered throughout the SEC complaint, but the matters actually complained of are set forth in great and specific detail.

That a court would permit the SEC to go beyond the specific facts alleged and use the conclusory language of the complaint as a springboard into an investigation of all the affairs of the defendants for a three, four or five-year period seems highly unlikely. Nor will we ever know whether a court, if faced with a motion to strike the conclusory allegations as surplusage or to limit the case to the matters specifically complained of, would enter an order to such effect. The complaint was never tested in any judicial forum, nor could it be, since a consent judgment

disposing of the action was entered in the District Court just four days after the filing of the complaint.

B. Plaintiff's Conclusory-Ultimate-Evidentiary Distinction is Irrelevant

To evade the logical consequences of Segal, appellant belabors the distinction between "conclusory" facts, "ultimate" facts and "evidentiary" facts. While conceding that "conclusory" allegations do not meet the particularity requirement of Rule 9(b), he argues that the pleading of "ultimate" facts is sufficient (Segan Br. 41-45). These distinctions are at best, elusive, and distinguished commentators have cautioned against the introduction of such distinctions into discussions of this nature, 5 Wright & Miller, Federal Practice and Procedure: Civil §1298 at 409-10 (1969).

In any event, such distinctions do not advance appellant's attempt to sustain the non-factual, conclusory allegations of the complaint. Indeed, the very cases upon which he relies (Segan Br. at 41-3) betray the weakness of his argument:

In New York N.H.& H. R. Co. v. New England Forwarding Co., Inc., 119 F.Supp. 380 (D.R.I. 1953), for example,

the Court dismissed the fraud count because "neither the original nor the amended complaint alleges or sets forth any facts pertaining to fraud" (Id. at 382). (Emphasis added) In Chicago Title & Trust Co. v. Fox Theatres Corp., 182 F. Supp. 18 (S.D.N.Y. 1960), the Court found the petition fatally defective because it "fails to state facts" from which fraud could be concluded (Id. at 39). A similar condemnation is found in Barnes v. Boyd, 8 F. Supp. 584, 593 (S.D. W.Va. 1934).

In Textile Banking Co. v. S. Starensier, Inc., 38 F.R.D. 492 (D. Mass. 1965), where the Court upheld the sufficiency of a complaint in the face of a Rule 9(b) objection, the action related to one factoring agreement and the "complaint sets forth the content of the alleged misrepresentations, the period during which the representations were made, the facts misrepresented and an identification of what has been obtained" (Id. at 493). (Emphasis added)

None of the cases support the claim that the pleading of a "typical example" is sufficient to sustain a complaint alleging fraud in conclusory terms in respect of multiple transactions.

C. Counsel's Verification is Not an Acceptable Substitution for Rule 9(b)'s Particularity Requirement

One of the most salient features of the complaint is that each and every allegation is based upon information and belief, excepting only the allegation that appellant is a shareholder of the Fund. We emphasize this point not because there is anything improper in filing such a pleading; indeed, we understand that such pleadings are typical of shareholder derivative suits. What we do criticize is the fact that appellant's counsel, having drafted such a complaint, then saw fit to state that the factual basis for the allegations was reliance upon "documents and records and conversations with the aforesaid plaintiff and others." Such a verification is plainly insufficient. As this Court stated in Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972):

> "The allegations violate the general rule that Rule 9(b) pleadings cannot be based 'on information and belief.' While the rule is relaxed as to matters peculiarly within the adverse parties' knowledge, the allegations must then be accompanied by a statement of the facts upon which the belief is founded." (Emphasis added).

In Duane v. Altenburg, 208 F.2d 515 (7th Cir. 1962), the only case relied upon by the plaintiff for his novel

contention that a verification such as that employed here is sufficient (Segan Br. at 45-46), the Court of Appeals for the Seventh Circuit affirmed dismissal of the complaint, holding 297 F.2d at 518:

> ". . . allegations of fraud such as are here involved when made on 'information and belief' must be accompanied by a statement of the facts upon which the belief is founded." (Emphasis supplied).

If a verification such as that here utilized is sufficient, then the teaching of cases such as Segal and Duane would be rendered meaningless. Such a verification adds nothing of substance to the certificate of the attorney signing the complaint that "to the best of his knowledge, information and belief, there is good ground to support it".

There is here a subtle but critical distinction. A belief may, indeed, be based on conversations with witnesses and perusal of documents, but the facts which support the belief is the information disclosed by the witnesses and documents, not the fact that witnesses have been interviewed and documents have been examined. Thus, when a complaint is based upon information and belief, plaintiff must set forth facts which would logically support the conclusion that fraud has been committed. It is not

sufficient merely to allege that though conversations with witnesses and perusal of documents, the pleader has become convinced of the truth of his allegations. See Schlick v. Penn-Dixie Cement Co., N.Y.L.J. Nov. 4, 1967 at 1 (2d Cir. 1974); Goldberg v. Shapiro, CCH Sec. L. Rep. ¶ 94,813 (S.D.N.Y. 1974).

The obvious purpose of the requirement that facts be stated on which allegations based upon information and belief are founded is to permit a court to satisfy itself that plaintiff's grounds for belief are sufficient to put one accused of fraud to the burden of defending himself. That purpose would be completely frustrated if conclusory allegations such as those here relied on were deemed to be sufficient.

II

APPELLANT'S APPLICATION FOR DISCOVERY WAS IMPROPER

As previously noted, a fundamental fallacy of appellant's argument is the claim that the District Court's Order which directed the filing of a more definite statement required plaintiff to plead minute evidentiary detail (Segan Br. at 34-36, 38 and 54). Nothing could be further from the fact.

The Court's decision required only a factual identification of the events about which the plaintiff complained, sufficient to permit defendants to know which of the many thousands of transactions in which the Fund participated during a more than three year period were claimed to be fraudulent, together with a brief statement of the facts upon which the claim of fraud is based.

On the basis of this misinterpretation of Judge Cannella's Order, appellant then contends that discovery under Rules 26 and 27 of the Federal Rules of Civil Procedure should have been allowed prior to the filing of the more definite statement. As the District Court properly recognized, however, the Rules provide no authority for discovery under the present circumstances; indeed, the attempt to engage in discovery in such circumstances is tantamount to an admission that without such discovery

appellant will not or cannot comply with Rule 9. The use of discovery in these circumstances was specifically condemned by this Court in Segal v. Gordon, 467 F.2d 602, 609:

> "Plaintiff's counsel clamors for an opportunity to have 'discovery'. He has read in the Wall Street Journal of 'preliminary discussions' between certain directors who 'supposedly' were parties thereto and, although admittedly 'nothing had been finalized' according to the press release, would have discovered 'of the reasons and motivations for the announcement.'
>
> The courts should not lend themselves to this sort of pseudo-legal harrassment. . . ."

But even apart from the strictures of Rule 9(b), appellant's request for discovery was unauthorized by the Federal Rules and properly denied by the District Court. Thus, Rule 26 contemplates discovery only after the filing of a complaint stating a claim upon which relief can be granted. It does not authorize discovery in order to develop facts for use in drafting a complaint. Particularly pertinent in this respect is the Court's observation in United States v. Atlantic Basin Iron Works, 53 F.Supp. 268, 271 (E.D.N.Y. 1944):

> "'I do not understand that the Federal Rules of Civil Procedure . . . or any other rule of law or practise, will justify a suit against an individual or corporation which does not state a case, and then permit the plaintiff to call witnesses in a fishing expedition with the hope that somewhere or somehow

> it may develop that a defendant has some liability.'" 53 F.Supp. at 271 quoting Mebco Realty Holding Co. v. Warner Bros. Pictures, Inc., 44 F. Supp. 591, 592 (D. N.J. 1942).

Similarly, Wright and Miller have urged courts to

> ". . . exercise caution in opening up the discovery process in an action in which it is uncertain whether a valid claim or defense actually exist." Federal Practice & Procedure: Civil § 1379 at 778 (1969).

Equally inappropriate is the invocation of Rule 27. By its very terms, Rule 27 is designed for the perpetuation of testimony in connection with a proposed action not then capable of being instituted; it does not authorize the taking of testimony in order to permit the framing of a complaint, or for purposes of discovery; Petition of Ferkauf, 3 F.R.D. 89, 90-91 (S.D.N.Y. 1943); Petition of Johanson Glove, 7 F.R.D. 156, 157 (E.D.N.Y. 1945); Petition of Exstein, 3 F.R.D. 242, 243 (S.D.N.Y. 1942); Petition of Gurnsey, 223 F. Supp. 359, 360 (D. D.C.

1963)*. Indeed, the courts have consistently characterized the use of Rule 27 for discovery purposes as an "abuse". See, e.g., Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961). See generally, In re Killian, 14 F.R.D. 471 (D. Mass. 1953); Wright & Miller, Federal Practice and Procedure: Civil § 2071 at 333 (1970); Sunderland, Discovery Before Trial Under the New Federal Rules, 15 Tenn. L. Rev. 737, 744 (1939).

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* We further note the following discrepancies between the provisions of Rule 27 and appellant's showing when he sought to invoke its authority.

(i) Appellant conceded in the notice of motion -- indeed, he affirmatively alleged -- that the purpose of the proposed application was to permit "the plaintiff to take discovery of defendants for the purpose of framing a more definite statement to be filed herein as an amended complaint" (A-66). No claim was made, however, that any discovery was needed for the purpose of perpetuating testimony, the only purpose for which Rule 27 can properly be invoked;

(ii) Appellant's application did not recite "the facts which he desires to establish by the proposed testimony, and his reasons for desiring to perpetuate it", all as required by Rule 27(a)(1); and

(iii) Appellant's application did not even specify the name of the person whose testimony he sought to perpetuate.

Mosseler v. United States, 158 F.2d 380 (2d Cir. 1946), cited by appellant at page 53 of his brief, is not to the contrary. There, a mother sought and received permission to take the deposition of her dying son, a Navy seaman who was claimed to have been negligently injured in the course of his duties. The purpose of the deposition was not to allow the mother to discover whether or not, upon the death of her son, she would have a cause of action. This she could have determined in conversation or correspondence with her son, without judicial intervention. The purpose was to perpetuate the son's testimony to use after he was dead.

Finally, we note that it was obviously appellant's intent to proceed not by deposition but by means of the self-same written interrogatories which had earlier been propounded for the alleged purpose of helping the defendants determine what they were charged with (A-42). Rule 27, however, does not authorize the propounding of interrogatories for any purpose, much less the purpose for which plaintiff intended to use them.

III

NEITHER OF THE ORDERS APPEALED FROM REQUIRED IDENTIFICATION OF PLAINTIFF'S "INFORMER" OR DISCLOSURE OF CONFIDENTIAL WORK-PRODUCT

Appellant continues to assert that the District Court's Orders required disclosure of his counsel's work-product and identification of an "informer" who mysteriously appeared in the office of appellant's counsel and supplied him with the information upon which he claims to have based his conclusory allegations of fraud. (Segan Br. at 52-53). The argument is totally devoid of merit.

In the first place, it has long been settled that the work-product privilege does not protect disclosure of the names of witnesses or potential witnesses. Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524 (M.D.N.C. 1967); Roberson v. Ryder Truck Lines, Inc., 41 F.R.D. 166 (N.D. Miss. 1966). See also Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964). There is, moreover, no "informer's privilege" which could protect appellant's alleged informer; and the name would, in any event, almost certainly be obtained in the course of discovery.

Second, the specification of the particular

transactions complained of does not call for or require the names of sources of information, confidential or otherwise. Appellant was quite capable of pleading his purported claim arising out of the ITT transaction without disclosing the names of confidential informants. (A-13 to 14). It is difficult to fathom how specification of another transaction, involving, for example, AT&T or General Motors, could lead to the disclosure of the identity of appellant's informer any more than specification of a transaction alleged to involve ITT. If appellant or his counsel know of other transactions on the basis of which they intend to assert a claim of wrongdoing, there is no reason why such transactions cannot similarly be alleged.

Third, the claim that the specification of transactions other than ITT would somehow or other involve a violation of the "work-production" privilege is equally frivolous. Obviously, every attorney who prepares and files a complaint must, if he is to comply with the requirements of Rule 11, conduct a pre-complaint investigation sufficient to satisfy him that "to the best of his knowledge, information and belief there is good ground to support" the complaint. Thus, the drafting and filing of allegations in

any complaint involves, in a very real sense, a disclosure of counsel's intellectual and investigative effort.

Finally, it should be noted that if "work-product" can be invoked in circumstances such as this to preclude the pleading of the specific facts and transactions upon which plaintiff's claim of fraud is based, a complaint could never be dismissed under Rule 9(b). Any plaintiff could allege fraud in the same conclusory terms as appellant, and, when challenged under Rule 9(b), invoke the "work-product" privilege to avoid the requirements of Rule 9.

In any event, and for whatever reason, it is clear that appellant was not "willing to put himself on record as to what the alleged fraud consists of specifically". Segal v. Gordon, 467 F.2d 602, 609. Under these circumstances, the District Court had no choice but to dismiss the complaint.

IV

PLAINTIFF"S FAILURE TO FILE A MORE DEFINITE STATEMENT WARRANTEED DISMISSAL

As noted above, the District Court, on May 11, 1973, directed appellant to file a more definite statement. Plaintiff's time to comply with that order expired no later than September 4, 1973. No such statement was ever filed.

Rule 12(e) of the Federal Rules of Civil Procedure provides that if "the order of the court is not obeyed wihtin 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

Rule 41(b) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Courts have not hesitated to order dismissal where a plaintiff has failed to file a more definite statement after having been directed to do so. E.g., Mooney v. Vitolo, 435 F.2d 838 (2d Cir. 1970); Transoceana S.A. v. Ocean Freighting & Brokerage Corp., 10 F.R.D. 129 (S.D.N.Y. 1950).

Particularly pertinent is Kellman v. ICS, Inc., 447 F.2d 1305 (6th Cir. 1971), also an action alleging securities fraud. The District Court there dismissed the complaint for failure of the plaintiff to satisfy the requirement of Rule 9(b), after having been afforded an opportunity to do so. The Court of Appeals affirmed, saying (447 F.2d at 1310):

> "Since details of the alleged fraud were never offered in an amended complaint even though two amendments were made and since counsel was put on notice of the need for these details, we hold that the District Judge was correct in dismissing the complaint for failure to state a claim upon which relief could be grant. . . . Counsel had the opportunity to correct the insufficient complaint by amending to add details, but he never took advantage of that opportunity. Hence, because of Rule 9(b), the complaint stood as if the essential allegation of fraud had never been made."

Thus, the District Court's Order was not only proper it was, if anything, too lenient, since it dismissed the complaint without prejudice, and left appellant free to file a new action in the District Court more than a year ago. Appellant, however, chose to appeal the District Court's Order. The reason is obvious. Appellant is unable to comply with Rule 9(b) in respect of any of his claims and has no desire to litigate the ITT transaction, the only claim which he even bothered to identify. In such circumstances,

no useful purpose would be served in further prolonging this litigation. We submit that the Order of the District Court should be affirmed.

CONCLUSION

This action has been pending for approximately two and a half years. The Dreyfus Corporation and their officers, professional fiduciaries, have been forced to live and conduct their business under a cloud cast by the unspecified conclusory allegations of fraud contained in the complaint. For some five months, appellant was faced with an order directing him to specify the frauds claimed to be involved. Instead of doing so, however, appellant sought to engage in a form of discovery nowhere authorized by the Federal Rules and contrary to the spirit and purpose of Rule 9(b). The District Court ultimately dismissed the complaint, but without prejudice. Instead of filing a new complaint as permitted by the District Court's Order, appellant chose to take this appeal. In our view, appellant has demonstrated that he is not only unwilling or unable to

specify the additional frauds which he is so eager to assert; he is also unwilling to proceed with the only claim which he is prepared to plead with some degree of specificity.

For each of the reasons assigned, the judgment of the District Court should be affirmed.

Respectfully submitted,

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